FILE COPY

Office Supreme Court, U.S.
AUG
FILED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 255

JOSEPH A. CHASE
RAYMOND BARNES
BERNICE BUDD
DANIEL W. CUNNINGHAM

Petitioners

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. CLIFFORD ALLDER
KENNETH D. WOOD
Counsel for Petitioners
401 Third Street, N. W.,
Suite 401
Washington 1, D. C.

INDEX

	Page
Table of Authorities	ii
Opinions Below	1
Jurisdiction	3
Constitutional Provisions and Statutes Involved	2
Questions Presented	2
Statement	5
Summary of Argument	7
Argument	9
I. The Court Erred In Admitting In Evidence A Statement Made To Police Officers By Mrs. Flay Chase, Subsequent To Her Arrest On February 8, 1957	9
II. The Court Erred In Failing To Instruct The Jury That The Statement Of Flay Chase, Indicted Herein, Should Be Limited To The Participation, If Any, In The Offenses Enumerated In The Indictment	12
III. The Court Erred In Denying The Motion To Suppress, Preliminarily, And At The Trial, Of Evidence Seized In The Premises 239 - 12th Street, S. E., Washington, D. C.	13

IV. The Court Erred In Denying The Motion To Suppress, Preliminarily, And At The Trial Respecting The Evidence Admitted, Allegedly Taken From The Person Of The Appellant Bernice Budd, At The Time Of Her Arrest On February 11, 1957 19

V. The Court Erred In Admitting In Evidence Two Bags of Number Slips Found In The Premises 79 Pierce Street, N. E., Washington, D. C. 21

VI. The Court Erred In Denying Appellants' Motions For Directed Verdicts 22

VII. The Court Interfered With The Orderly Deliberation Of The Jury 23

Conclusion 27

CASES CITED

	Page
Baumboy v. *United States*, 24 F. 2d 512	18
DeBruhl v. *United States*, 91 U. S. App. D. C., 125	3, 17
Fiswick v. *United States*, 329 U. S. 211, 91 L. Ed. 196	11, 13
Green v. *District of Columbia*, 91 A. 2d 712	4, 16
Grunewald v. *United States*, 353 U. S. 866	11
Kotteakos v. *United States*, 328 U. S. 750, 90 L. Ed. 1557	11
Krulewitch v. *United States*, 336 U. S. 440, 93 L. Ed. 790	10
Logan v. *United States*, 144 U. S. 263, 36 L. Ed. 429	9
Lutwak v. *United States*, 344 U. S. 604, 97 L. Ed. 593	13
Mallory v. *United States*, 1 L. Ed. 2d 1479	20
Mills v. *United States*, 90 U. S. App. D. C. 365	3, 15
Paoli v. *United States*, 352 U. S. 232, 1 L. Ed. 278	11, 13
Price v. *United States*, 119 A. 2d 718	16
United States v. *Johnson*, 113 F. Supp. 359	4, 17
United States v. *Reynolds*, 111 F. 589	17
Washington v. *United States*, 92 U. S. App. D. C. 31	3, 14
Wyche v. *United States*, 90 U. S. App. D. C. 67	3, 17

BOOKS AND PUBLICATIONS

The Law of Arrest (*Alexander*), Vol. 1, page 451 ... 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No.

JOSEPH A. CHASE
RAYMOND BARNES
BERNICE BUDD
DANIEL W. CUNNINGHAM

Petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

No opinions were written by the United States District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia Circuit was decided June 26, 1958 and reads as follows:

Per Curiam: These appeals are from convictions of conspiring to violate, and violating the lottery laws of the District of Columbia. We find no error affecting substantial rights.

AFFIRMED.

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the Constitution Provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, 'and particularly describing the place to be searched, and the persons or things to be seized.''

Title 18, Section 371—Conspiracy to commit offense or to defraud United States.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

Title 22, Section 1501—19. C. Code—Lotteries—Promotion—Sale or possession of tickets.

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or

transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000.00 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C., #1254 (1). The judgment of the United States Court of Appeals for the District of Columbia Circuit, was entered on June 26, 1958.

The point raised in this petition, to wit, that there was no probable cause for the issuance of a search warrant for certain premises in the District of Columbia for the reason that the police had received *no information* that the premises were being used in the operation of a lottery, has never been decided by the United States Court of Appeals for the District of Columbia Circuit. The following cases decided by that court all reveal information had been received by the police before application for search warrant: *Wyche* v. *United States*, 90 U. S. App. D. C., 67; *DeBruhl* v. *United States*, 91 U. S. App. D. C., 125; *Washington* v. *United States*, 92 U. S. App. D. C., 31 and *Mills* v. *United States*, 90 U. S. App. D. C. 365.

There's a difference of opinion among the Judges of the United States District Court for the District of Columbia, concerning probable cause for the issuance of a warrant, where the facts in support of the warrant show observation only without any contact having been made by the police with the defendant and no observation of any gambling transaction, but, only observation of persons with bulging pockets going in and out of premises, some of whom have been known to the police as having been engaged in the gambling business previously at other places. The trial court in the instant case took the view that mere observation, standing alone, was sufficient for the issuance of a search warrant for a premises. On the other hand, the Chief Judge of the District Court has held, in *United States* v. *Johnson*, 113 F. Supp. 359,

> "Probable Cause means more than suspicion, *it being essential that there be knowledge and information* sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."

The Municipal Court of Appeals in *Green* v. *District of Columbia*, 91 A 2d 712, recognized the necessity of knowledge and information, when it stated:

> "In the Brinegar as well as the Carroll case the Court in finding there was probable cause relied almost exclusively on the fact that the officers had information gained as a result of their personal negotiations with the defendants on occasions prior to the arrest, and the fact that in both cases the officers knew at the time of the arrest that defendants were violators of the statute."

Statement of the Case

Petitioners were convicted under an indictment in thirteen counts, which charged them with conspiring to violate the lottery laws of the District of Columbia; operating a lottery; possession of number slips; violation of the tax-stamp statute and petitioners Barnes and Chase with permitting the maintaining of a gambling premise.

On February 1, 1957, the defendant Daniel W. Cunningham entered the premises 137 - 12th Street, N. E., with bulging pants pockets, and on February 2, Cunningham entered those premises again with bulging pockets.

On February 4, 1957 the defendant Bernice Budd left the premises 137 - 12th Street, N. E., and drove away in an automobile driven by another.

On February 4, defendant Cunningham left 137 - 12th Street, N. E., with a paper bag and entered the premises 140 - 12th Street, N. E.

On February 5, Cunningham entered the premises 137 - 12th Street, N. E. with bulging pockets.

On February 6, Bernice Budd left the premises 239 - 12th Street, S. E.

On February 6, Cunningham left 239 - 12th Street, with bulging pockets.

On February 7, Cunningham entered 239 - 12th Street, S. E., with bulging pockets.

On February 7, Bernice Budd entered 239 - 12th Street, S. E. carrying a brown paper bag.

On February 7, Barnes arrived in the alley behind 239 - 12th Street, S. E., in an automobile.

On February 7, Barnes went in 239 - 12th Street, S. E., with a paper bag, and subsequently left the premises.

On February 7, Cunningham left the premises 239 - 12th Street, S. E., carrying a brown paper bag.

On February 7, Bernice Budd appeared at the rear of 239 - 12th Street, S. E., re-appeared two minutes later, and left the premises.

On February 8, Bernice Budd, carrying a large bulging pocketbook entered the rear of 239 - 12th Street, S. E.

On February 8, Cunningham entered the premises 239 - 12th Street S. E., with coat pockets bulging.

On February 8, Barnes, carrying a large cardboard box, entered 239 - 12th Street, S. E.

On February 8, Barnes entered 239 - 12th Street, S. E., carrying a brown bag.

On February 8, Barnes left 239 - 12th Street, S. E., and entered a Mercury automobile driven by Joseph Chase, and was driven from the area.

On February 8, Barnes alighted from same Mercury, driven by Chase, and carried a green portable television set and a cardboard box into 239 - 12th Street, S. E., and Chase drove away.

On February 8, Barnes was present in a closed closet on the second floor of 239 - 12th Street, S. E.

On February 11, Bernice Budd, carrying a pocketbook containing a brown paper bag drove off in a car occupied by Cunningham. On the same date, in an alley in the rear of the 400 block of New York Avenue, N. W., Bernice Budd had in her possession two brown paper bags containing lottery slips.

On February 11th, Cunningham entered the premeises 79 Pierce Street, N. W., carrying a large brown paper bag containing lottery slips.

On February 11, 1957, the defendant Bernice Budd was arrested in an alley in the rear of the 400 block of New York Avenue, N. W. The arresting officer had no warrant for her, nor had one been obtained. The defendant Cunning-

ham was never arrested; and no warrant was sought for his apprehension. The defendant Barnes was arrested in the premises 239 - 12th Street, S. E. The defendant Chase was never arrested, nor was an arrest warrant requested for his apprehension.

Statement of Points

1. The Court erred in admitting in evidence a statement made to police officers by Mrs. Flay Chase subsequent to her arrest on February 8, 1957.

2. The Court erred in failing to instruct the jury that the statement of Flay Chase, indicted herein should be limited to the declarant only in determining declarant's participation, if any, in the offense enumerated in the indictment.

3. The Court erred in denying the motion to suppress, preliminarily, and at the trial of evidence seized in the premises 239 - 12th Street, S. E., Washington, D. C.

4. The Court erred in denying the motion to suppress, preliminarily and at the trial, respecting the evidence admitted allegedly taken from the person of the defendant Bernice Budd, at the time of her arrest on February 11, 1957.

5. The Court erred in admitting in evidence two bags of number slips found in the premises 79 Pierce Street, N. E., Washington, D. C.

6. The Court erred in denying appellants' motions for directed verdicts.

7. The Court interfered with the orderly deliberation of the jury.

Summary of Argument

The petitioner, Daniel W. Cunningham, contends that there was insufficient evidence presented by the Government to submit to the jury, his alleged participation in a conspiracy to violate the lottery laws of the District of

Columbia; his participation in operating a lottery; possession of lottery slips, and violation of the tax-stamp statute.

There was no testimony at the trial of this cause that the police had received any information concerning Cunningham's participation in this alleged operation. Other than seeing Cunningham enter premises under observation, there was no testimony connecting him with an illegal enterprise. There was not testimony indicating any plays were made with him, nor was there any information imparted to the police that he was suspected of being part of the operation. Cunningham was never arrested, and there was no evidence that he had in his possession numbers materials to connect him with the alleged violations. Officer Jefferson testified (J.A. 19) that on February 11, 1957 he observed Cunningham enter the premises 79 Pierce Street, N. W., carrying a bag. Upon entering the premises Officer Jefferson stated that he found two bags containing numbers. There was no testimony that Cunningham was seen to have deposited the bags found, nor did the officer see him in the premises, or leaving the premises. The officer stated that Cunningham had "a bag" in his possession, yet two were found in the premises. There never was an application for a warrant for Cunningham, and he was never arrested. Although Officer Jefferson testified that Cunningham was known to him.

As to Petitioner, Bernice Budd, her position follows that taken by Cunningham, in that the evidence was insufficient to submit her case to the jury on any count in the indictment. No plays were made with her, there was no information imparted to the police concerning her, and her arrest was illegal for the reason that there was not sufficient probable cause upon which to predicate a valid arrest. There was no warrant for her arrest.

Argument

I. The Court Erred In Admitting In Evidence A Statement Made To Police Officers By Mrs. Flay Chase, Subsequent To Her Arrest On February 8, 1957.

The defendant, Flay Chase, (acquitted by the Jury) was arrested in her home at 239 - 12th Street, S. E., Washington, D. C. Corporal Palmisano, of the Morals Division of the Metropolitan Police Department, testified that Mrs. Chase, in response to questions propounded by him, stated that she knew her son Joseph Chase was in the numbers business, and that he had been using the basement for the past two or three days, but she didn't know anything about what he was doing.

It is the contention of the petitioner, Joseph Chase, that where an incriminating extrajudicial statement is made by one conspirator, in the absence of his co-conspirators and without their authority or assent, after the conspiracy has ended, whether in success or failure, such as a statement made after the declarant has been apprehended, is not admissible in evidence against the co-conspirators. The same is true of a statement not made in furtherance of the conspiracy, even though made prior to its termination.

As the Supreme Court related in *Logan* v. *United States*, 144 U. S. 263, 36 L Ed 429, where a co-conspirator, whose indictment had been severed from those upon which convictions were obtained, had made certain incriminating statements concerning Logan, the admission of these declarations was reversible error, under the rule that after a conspiracy has come to an end, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others. The Court pointed out that even if the conspiracy included an attempt to manufacture evidence to shield Logan, the declarations that he acted with the mob at ~~the fight were not~~ *in execution or furtherance of the conspiracy, but were mere narratives of*

a past fact. In the instant case, the statements attributed to Mrs. Chase were certainly within the category established in Logan as "narratives of a past fact." As indicated by Corporal Palmisano's testimony, (J. A. 45) she is alleged to have stated "her son Joe Chase *had been* using the basement for the past two or three days." And as pointed out in Logan, the declarations "were not in execution or furtherance of the conspiracy."

As the Supreme Court observed in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L Ed 790.

> "There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This pre-requisite to admissibility, that hearsay statements by some conspirators to be admissible against other must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."

The Court, in answer to the Government's contention that if not admissible in furtherance of the conspiracy, it should have been received under the theory that it was made with the thought in mind at preventing detection and punishment, stated:

> "No federal court case cited by the Government suggests so hospitable a reception to the use of hearsay evidence to convict in conspiracy cases."

It is contended by petitioner Chase, that no other evidence in this case connects him with the operation of a lottery.

and that the statement of his mother admitted in evidence in this case was damaging to the point that on that statement alone, conviction was almost a certainty. This is not a case where the other evidence against Chase was overwhelming, and the statement merely cumulative. See also *Grunewald* v. *United States*, 353 U. S. 866.

As was indicated by the Supreme Court in *Kotteakos* v. *United States*, 328 U. S. 750, 90 L Ed 1557, and reiterated in Krulewitch,

> "Error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict."

As was stated in *Paoli* v. *United States*, 352 U. S. 232, 1 L Ed 278,

> "This Court long has held that a declaration made by one conspirator, in furtherance of a conspiracy and prior to its termination, may be used against the other conspirators. However, when such a declaration is made by a conspirator after the termination of the conspiracy, it may be used only against the declarant and under appropriate instructions to the jury."

And in *Fiswick* v. *United States*, 329 U. S. 211, 91 L Ed 196,

> "If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the government was the objection of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators."

II. The Court Erred In Failing To Instruct The Jury That The Statement Of Flay Chase, Indicted Herein, Should Be Limited To The Declarant Only, In Determining Declarant's Participation, If Any, In The Offenses Enumerated In The Indictment.

In his charge to the jury, the Court stated (J. A. 134)

> "* * * It likewise is the rule of law that when you are convinced that there has been the establishment of the conspiracy, then whatever one of the persons charged whom you believe beyond a reasonable doubt is in that conspiracy, whatever that person may say concerning the activities of others is binding upon the others even though they may not be present when the statement is made."

And at (J. A. 135) the Court further instructed the jury:

> "The Court also charges you that to merely make statements of the activities of others, is not sufficient to show a conspiracy. You find a conspiracy first, the agreement or combination, and then whatever one does, on the theory of partnership in crime, binds everybody else and whatever one says in furtherance of the conspiracy likewise binds everybody else."

While the Court did not so state, he was referring to the conversation between Mrs. Chase, and Corporal Palmisano, Mrs. Chase being the only defendant who made a statement to the police. Objection was made to the form of the Court's instructions. (J. A. 141)

It is appellant's contention that the statement by Mrs. Chase was not made in furtherance of the alleged conspiracy, but after her arrest, and if admissible at all, only on the theory of Mrs. Chase's participation if any in the alleged conspiracy to violate the lottery statute. It is clear from the Court's instructions that he advised the jury that "it binds everybody else."

In *Paoli* v. *United States*, 352 U. S. 232, 1 L Ed 2d 278, quoting from *Lutwak* v. *United States*, 344 U. S. 604, 97 L Ed 593, concerning declarations of a conspirator as being limited to declarant only, said:

> "Relevant declarations or admissions of a co-conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy may be admissible in a trial for conspiracy as against the declarant to prove the *declarant's* participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only."

From the foregoing, it is apparent that the instructions given by the Court as to the use of the statement of Mrs. Chase, caused irreparable damage, especially to Joseph Chase, and violated the mandate of the Supreme Court regarding the precautionary instruction to be given.

The application of a co-conspirator's statement, subsequent to arrest, was disposed of by the Supreme Court in *Eiswick* v. *United States*, 329 U. S. 211, 91 L Ed 196, when they related the following:

> "Moreover, confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise."

III. The Court Erred In Denying The Motion To Suppress, Preliminarily And At The Trial, Of Evidence Seized In The Premises 239 - 12th Street, S. E., Washington, D. C.

There was filed and argued, preliminarily, a motion to suppress that evidence which was seized at the above address. The pre-trial motion was denied, and when presented to the trial court, denied without hearing.

It is the contention of the appellants, that the affidavit

upon which the search warrant was predicated, was insufficient in that there was not an adequate showing of probable cause as required by law.

Nowhere in Detective Jefferson's affidavit does he state that he had received any information, reliable or otherwise, that the above premises was being used in the operation of a lottery. Nowhere in his affidavit does he state that of his personal knowledge, he knew the premises was being so used.

Apparently, Detective Jefferson relied upon his recognition of some of the persons frequenting the house and concluded that the premises was being used in the operation of a lottery. In other words, Jefferson, from his affidavit, suspicioned the use of the premises without more.

The Court of Appeals for the District of Columbia Circuit, in reviewing the affidavit for a search warrant in *Washington* v. *United States*, 92 U. S. App D. C. 31, considered the following as pertinent in making their determination:

> "A search warrant was issued on a police officers affidavit. It shows that he received information 'from a source which in the past has proved reliable' of a numbers business being conducted over certain telephones; he investigated and found those telephones listed for the premises named; that he received information from the same source, that these premises were the headquarters of Washington, and one Grear; and that he knew these men as number operators. Telephone calls by the officer whereby he obtained the numbers for the day. He asked to speak to 'Wash' and each time someone answering to that name was summoned to the telephone. We agree with the trial court that these circumstances provide sufficient probable cause to sustain issuance of the warrant."

In *Washington*, the affidavit related that information received was from a source that had proved reliable in the past; that the officer made an investigation which corroborated the information received. His information as to the occupants of the establishment also proved reliable. In the instant case there was no information, imparted to the officer nor did he conduct any investigation with the exception of observations.

In *Mills* v. *United States*, 90 U. S. App D. C. 365. The Court had an occasion to determine whether probable cause existed and fashioned this query:

> "Were the facts and circumstances within the arresting officers knowledge and of which they had reasonably trustworthy information, sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed?"

So again, that Court alludes to information in possession of the officer. Not only facts and circumstances within his knowledge but, "and of which they had reasonably trustworthy information."

In *Mills* that Court concluded that no single circumstance would, of itself, have been sufficient, yet out of the whole combination, it found three significant factors. First, there was information imparted to the officers; secondly, surveillance which indicated a course of conduct in a collecting business, and third, the attitude of appellant when accosted.

Here, we have no information imparted, no evidence of collections being made, and no peculiar attitudes on the part of those defendants which were arrested. Following the doctrine of *Mills*, it is respectfully represented that none of the circumstances in the instant case give rise to more than suspicion. Certainly not probable cause.

In reviewing a conviction for possession of lottery slips,

the Municipal Court of Appeals for the District of Columbia, in *Price* v. *United States*, 119 A. 2d 718, was called upon to determine whether probable cause existed for the arrest of appellant. In part, the decision reads as follows:

> "The arresting officer testified that Price had informed him of the illegal nature of his business approximately two months prior to the arrest. The officer checked Price's police record and determined that he had been arrested previously for a numbers violation. Coupled with this, we note the peculiar conduct of McGruder Price when the officer saw him in the neighborhood of his 'corner'. The officer testified that Price seemed to avoid him on these occasions. That the facts just related are insufficient to establish probable cause is certain; however, when the events which occurred on the day of the arrest are considered in conjunction with them, we think the arrest was justified."

So, even with information from the petitioner that he was engaged in a lottery, and the fact that he had a record of previous violations for numbers, that Court held, was insufficient to establish probable cause and before holding that the arrest was justified, considered the events of the day of his arrest as being necessary to that conclusion.

In *Green* v. *District of Columbia*, 91 A 2d 712, in the course of its opinion, that Court included the following:

> "In the Brinegar as well as the Carroll case the court in finding there was probable cause relied almost exclusively on the fact that the officers had information gained as a result of their personal negotiations with the defendants on occasions prior to the arrest, and the fact that in both cases the officers knew at the time of the arrest that defendants were violators of the statute."

In the case at bar there was no information available to the officers from the defendant's or others and the affidavit supporting the warrant contained no averment that the officers *knew* the defendants were violators of the statute.

And in *DeBruhl* v. *United States*, 91 U. S. App D. C. 125, the Court reiterated its mandate regarding the requirements for probable cause when it stated:

> "The facts and circumstances within the arresting officers' knowledge, *and of which they had reasonably trustworthy information*, were amply sufficient to warrant a man of reasonable caution in the belief that appellant was taking numbers bets in the corridor of the Munitions Building." (italics supplied)

In *Wyche* v. *United States*, 90 U. S. App D. C. 67, The Court related:

> "By personal observation, the officers who conducted the search and made the arrests carefully check *the information they had received* from the informant." (italics supplied)

In *United States* v. *Johnson*, 113 F. Supp. 359, the District Court for the District of Columbia stated:

> "Probable cause means more than suspicion, *it being essential that there be knowledge and information* sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committted."

And in discussing affidavits for search warrants, in *United States* v. *Reynolds*, 111 F. 589, the same Court declared:

> "Affidavits which merely state that affiant has reason to believe and does believe that a crime has been com-

> mitted or is in course of being committed, for which go no farther than to allege conclusions of law or of fact, or which set out on mere information and belief, material facts on which right to search or seize is based are insufficient to support a search warrant and any search warrant issued on such affidavit is invalid."

An affidavit for a search warrant predicated upon the conclusions of a law enforcement officer was held to be insufficient in *Baumboy* v. *United States*, 24 F 2d 512, where, as here, no information had been imparted to the officer, but upon observations that known addicts were frequenting a rooming house operated by a narcotic dealer known to the officer, a warrant was issued.

Regarding the affidavit, the Court said:

> "The only material part of the affidavit is as follows: Affiant, on or about August 25 and 26, 1926, watched the premises occupied and controlled by a narcotic dealer known to affiant as Bom Boy, located in the St. Elmo Hotel, Stockton, Cal., and at the time and place affiant saw known addicts going to and from said hotel, and that affiant overheard one known addict, in conversation with Bom Boy, say that Bom Boy was out of morphine, but had plenty of cocaine. Affiant further alleges and avers that he knows Bom Boy is an extensive dealer in narcotic drugs."

The Court held that the facts stated in the affidavit are insufficient to constitute probable cause.

In comparing the affidavit in the instant case with the one in Baumboy, there was no statement that the premises was controlled by one known to the officer as one being in the lottery business. On the contrary, the officer stated in his affidavit that the premises was listed in the City Directory

as being in the name of Flay Chase, mother of Joseph Chase, who has no record. In *Baumboy*, the affidavit related the overhearing of a conversation concerning narcotics. No conversations overheard in this case. There was no showing in our affidavit that Mrs. Chase had ever been connected with lotteries, while Baumboy was known as an extensive dealer in narcotics.

Inasmuch as it appears from the authorities that information and knowledge should be required before probable cause can be said to exist, and that mere rendition of a police officer's conclusions of fact add no necessary ingredients, it is respectfully submitted that the search warrant issued as to premises 239 Twelfth Street, S. E., was improvident and the motions to suppress should have been granted, and the evidence obtained under authority of that warrant, not admitted.

IV. The Court Erred In Denying The Motion To Suppress, Preliminarily, And At The Trial, Respecting The Evidence Admitted, Allegedly Taken From The Person Of The Appellant Bernic Budd, At The Time Of Her Arrest On February 11, 1957.

There was no arrest warrant issued for the petitioner Budd, nor was one sought. She was arrested following observations by the police of her entering and leaving the premises 127 - 12th Street, N. E., and 239 - 12th Street, S. E. The police had no information that she was engaged in the operation of a lottery, nor do they state in the applications for search warrants for those premises, that they had been informed that they were used in an illegal enterprise. They attempt to justify her arrest without a warrant by concluding that probable cause existed that she was engaged in operating a lottery. On two occasions she was seen carrying a bag, and the day she was arrested she was carrying a large pocketbook, inside of which was a bag which contained number slips. A preliminary motion to

suppress was filed, heard and denied. The motion was renewed at trial and denied. Petitioner's contention is that she was arrested without probable cause. An arrest predicated upon suspicion, no matter how strong, must fail. As Alexander states in his *The Law of Arrest*, Vol. 1, page 451:

> " 'Suspicion' is an apprehension of something without proof, or upon slight evidence—or upon no evidence at all."

In *Price* v. *United States*, supra, the Municipal Court of Appeals ruled that even where a defendant had informed an officer that he was in the numbers business, and the officer checked and found he had convictions for lotteries, those facts were insufficient to indicate probable cause to arrest, and only the circumstances on the day of the arrest, when considered with the above, was the arrest justified.

Again, in *Mills* v. *United States*, supra, the test is whether the facts and circumstances within the arresting officer's knowledge and of which they had reasonably trustworthy information, sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Applying that test to the facts in the instant case, the only circumstance within the officer's knowledge was the observation of the petitioner, on two occasions with a brown bag, entering and leaving two premises, neither of which were tainted, and no information, trustworthy or otherwise. The acts of petitioner may have given rise to suspicion, but certainly not probable cause that she was committing a felony.

Accordingly, it is respectfully submitted, that the arrest of petitioner Bernice Budd on February 11, 1957 should have been held illegal and the evidence seized suppressed.

As was voiced by the Supreme Court of the United States in *Mallory* v. *United States*, 1 L. Ed. 2d 1479,

"The police may not arrest upon mere suspicion but only on 'probable cause' ".

V. The Court Erred In Admitting In Evidence Two Bags Of Number Slips Found In The Premises 79 Pierce Street, N. E., Washington, D. C.

The petitioner Daniel W. Cunningham, on February 11, 1957, was alleged to have entered the premises 79 Pierce Street, N. E., carrying a large paper bag. The police officer testified that he followed Cunningham into those premises, did not see him once Cunningham was inside, did not see him leave, and could not find him in the house. He further testified that in the house he found two bags containing number slips. Objection was made to the testimony of the officer, and to the admission of the contents of those bags in evidence, unless they could be connected with a defendant in the trial of this matter. Those objections were overruled. There were no pre-trial motions filed on behalf of Cunningham for the reason that he was never arrested, no warrant having been sought for his apprehension. When he was informed the police were looking for him he voluntarily appeared.

It will be noted that the testifying officer stated Cunningham went into the premises mentioned carrying a paper bag. The officer stated on the stand that he found in the house *two* bags containing numbers slips. The jury was permitted to conclude that the two bags found in the premises was the *one* bag the officer stated Cunningham had.

It is petitioner's contention that unless the Government could show that the bags found in the house had been in his possession they ought not have been admitted. The fact that bags of slips were found in the house was not evidence that petitioner brought them there.

VI. The Court Erred In Denying Petitioner's Motions For Directed Verdicts.

At the close of the government's case counsel for petitioners requested the Court to grant a motion for judgment of acquittal as to all counts in the indictment for the reason that the evidence presented by the government was insufficient.

As far as the premises mentioned throughout the trial of this case were concerned, there was no witness presented by the government to place any defendant in the basement of 239 - 12th Street, S. E., the alleged scene of the illegal operation. There was no evidence that a play was made with any defendant.

As to the petitioner Joseph A. Chase, on February 8, 1957 there was testimony that Raymond Barnes, a defendant, entered a Mercury automobile driven by Chase, at the front of premises 239 - 12th Street, S. E. On the same date Barnes alighted from a car driven by Chase and carried a television set and a cardboard box into those premises, and Chase drove away. The government's testimony indicated that about eight minutes elapsed between these two events. That is the only testimony that puts Chase near those premises.

With respect to petitioner Raymond Barnes, aside from the evidence indicated above, he was seen going into the alley behind 239 - 12th Street, S. E., in an automobile; he was observed carrying a paper bag into the house on two occasions; a cardboard box another time, and was arrested on the second floor. There was no evidence that he was engaged in the operation of a lottery. The fact that he was arrested there is tempered by the fact that he resided there with his mother.

The evidence presented relative to Cunningham and Budd has already been mentioned in Arguments Four and Five.

It is respectfully contended that in view of the foregoing,

the Court should have directed a judgment of acquittal as to all defendants, on all counts. The Court's attention is invited to the fact that when the officers entered the premises on February 8, at about 4:35 P.M., none of the defendants were present with the exception of Mrs. Chase and Raymond Barnes, her son, who reside there.

VII. The Court Interfered With The Orderly Deliberation Of The Jury.

The petitioners submit that the Court interfered with the orderly deliberation of the jury in considering this case. The jury received the case at 3:30 p.m., and nothing had been heard from up to 5:45 p.m. when the Court had them brought in and the following occurred:

The Foreman: Yes, sir, we have, Your Honor.

The Court: You have?

The Foreman: Yes, sir.

The Court: Have you arrived at a verdict regarding all defendants or just some of them?

The Foreman: Well, we have arrived at a verdict.

The Court: Just give it by number, 1, 2, 3.

The Foreman: In the first count, we have discussed it and arrived at a verdict upon all counts in that, Your Honor.

The Court: The first count? You mean as respects all defendants? (Tr 381)

The Foreman: Yes, sir. I am sorry, Your Honor, I hear whispering behind me. There seems to be some question as to whether we have or not, on the first count.

Mr. Allder: May we approach the Bench, Your Honor?

The Court: What I am driving at is this—I beg your pardon?

Mr. Allder: May we approach the Bench, Your Honor?

The Court: No; I want to get clear to the jury what we are talking about.

You appreciate that in order to return a verdict there must be unanimous agreement, all twelve must vote one way or the other, either guilty or not guilty, as respects any of the five defendants on trial.

Now, you tell me that you have arrived at a verdict, and where that is true all have voted one way regarding all of the five.

Apparently there seems to be a dispute.

The Foreman: On the first count we have.

The Court: Do not give me the verdict. I just want to know if you have arrived at one.

The Foreman: On the first count, we have polled each juror individually as to the question of each defendant, and there seems to be some question here whether we have decided on each one of them. (Tr 382)

The Court: Well, that is the point. I will have you retire and consider your verdict further, and then if you are able to arrive at a verdict on any of the counts, I will take that at that time.

I will call you back shortly. You may retire and consider of your verdict.

Before you leave, will counsel approach the Bench? (Thereupon counsel approached the Bench and the following occurred:)

Mr. Allder: I object to this, Your Honor.

The Court: Very Well.

Mr. Allder: I think this is a little bit on the side of pressurizing the individual jurors; and I think that since there is a state of confusion that nothing more should be said, since Your Honor indicated you were going to let them go home and let them come back tomorrow, and let them deliberate on the whole situation then.

I mean, I think we are in dangerous ground.

Mr. Smithson: I don't think Your Honor has said anything to pressure them.

Mr. Allder: I think it is prejudicial.

Mr. Smithson: I don't think you have said anything prejudicial or to pressure them. You warned them you didn't want to know what the verdict was, and only whether they have arrived at any verdict on any count.

The Court: That is what I am anxious to get. (Tr 383).

I will note your objection of record. It will be formally overruled, subject to your objection.

(Thereupon counsel resumed their places in the courtroom and the following occurred:)

The Court: Very well. The jury will retire. We will recess until the return of the Court.

(At 5:50 o'clock p.m., the jury left the courtroom to deliberate further upon its verdict.).

(At 6:20 p.m., the Court received a note from the jury with a question which was proper and the Court answered properly.)

(At 6:45 p.m., the Court had the jury brought in again and inquired whether it had agreed upon a verdict as follows:) (Tr. 384)

The Court: Just line up in front of the jury box, please. It saves time.

Now, before we take the return of the jury by the Clerk, may I ask you, Mr. Foreman, has the jury agreed upon a verdict in this case? (Tr 385)

The Foreman: We have reached a partial verdict on the first and second counts, Your Honor.

The Court: The word 'partial' implies to me that of the five defendants, you have arrived at verdicts in only part of them but not all five? Am I incorrect?

The Foreman: Well, Your Honor, we have on the first and second counts, Your Honor.

The Court: You have a unanimous finding in the first and second count regarding each of these five defendants?

The Foreman: Yes sir.

The Court: Very well, take the verdict, Mr. Clerk.

The Deputy Clerk: Mr. Foreman ——

Mr. Allder: May I interrupt to make objection to taking the verdict piecemeal, Your Honor? I think a complete verdict as to each defendant should be taken.

The Court: Very well, let your objection be of record, and the Court will overrule it." (Tr 386)

Petitioners believe that the fair thing to have done when the Court learned that there was confusion among the jurors was to allow them to go home for the evening and start deliberating again the next morning without being under any pressure from the Judge or with any thought of hurrying to get home for dinner or things planned for the evening. It is our opinion that the jury felt the Judge wanted the verdict that evening and the time of day being what it was

they were not allowed to come to their own independent verdict.

Conclusion

For the reasons stated above, the decision below should be reversed and the cause remanded to the court below with appropriate instructions.

Respectfully submitted,

H. Clifford Allder
401 Third Street, N. W.
Washington, D. C.

Attorney for Petitioners
Joseph A. Chase and
Raymond Barnes

Kenneth D. Wood
401 Third Street, N. W.
Washington, D. C.

Attorney for Petitioners
Bernice Budd and
Daniel W. Cunningham